



Memorandum

TO: ECONOMIC DEVELOPMENT
AND ENVIRONMENT COMMITTEE

FROM: Stephen M. Haase

SUBJECT: HABITAT CONSERVATION PLAN **DATE:** April 30, 2002

COUNCIL DISTRICT: Citywide

RECOMMENDATION

Accept the status report on the Habitat Conservation Plan (HCP)/Natural Community Conservation Plan (NCCP).

BACKGROUND

On June 25, 2001, the City committed to participate in the development of a multi-species Habitat Conservation Plan (HCP), Natural Community Conservation Plan (NCCP) in a letter to the United States Fish and Wildlife Service (USFWS), (attachment 1), also provided to the California Department of Fish and Game. The City committed to jointly prepare the Habitat Conservation Plan/Natural Community Conservation Plan (HCP/NCCP) with Santa Clara County to be submitted for approval by June 25, 2006. The County committed to the joint preparation of an HCP/NCCP in a similar letter from Supervisor Jim Beall, dated June 25, 2001, as did the Santa Clara Valley Water District in a letter dated June 27, 2001.

The purpose of this memo is to update the Council on the current status of this commitment, outline the immediate next steps, and identify the potential cost implications. Staff has proceeded based on the assumption that the City remains committed to completing the HCP/NCCP by 2006. As noted, the other local agencies are moving ahead, City staff want to ensure that Council reviews the same information as the respective Boards, in order to maintain the City's meaningful participation in this effort.

The commitment to the HCP/NCCP was made in response to a request from the USFWS that an HCP be prepared to address certain direct and indirect impacts to federally listed endangered species and their habitat from anticipated private development and public projects in San Jose and the County. The California Department of Fish and Game requested that a NCCP, the State's version of an HCP, also be prepared in conjunction with the HCP in response to the same projects. An explanation of the purpose and benefits of an HCP/NCCP is included with this report (*see Attachment 2*).

The HCP/NCCP is a high visibility process with broad implications for future development in certain areas of San Jose and Santa Clara County. The County and SCVWD have taken steps to move ahead to prepare an HCP/NCCP. The County hired a consultant to prepare a report, Santa Clara County HCP/NCCP Conservation Planning Strategies Report (*see Attachment 3.*), which outlines options and approaches to developing an HCP/NCCP and preliminary cost implications. The final report has been forwarded to the Board of Supervisors for consideration. The Santa Clara County Valley Water District (SCVWD) Board received the County report and remains resolved/committed to the preparation of an HCP/NCCP, whether with the other local agencies or alone.

ANALYSIS

This memo reviews the current status of activities, provides an overview of the HCP/NCCP process major steps, the immediate next steps for the City, and considers the potential cost implications of the HCP. The analysis addresses the key issues the City raised in response to the County's consultant report.

Status of Activities

Staff has been working with other local agencies based on the City's commitment made last year. The County organized the first local agency meeting in March to review their draft consultant report, which City and SCVWD staff attended. The local agencies met again on April 23 with representatives from the City and County of San Diego Multiple Species Conservation Plan. Another local agency meeting is scheduled for late May, after the Santa Clara County Board of Supervisors consideration of the report. A more detailed chronology is included with this report (*see Attachment 4*).

Last fall, a small group of City staff began informal discussions with some outside experts to learn more about the process, environmental-Dave Powers, biologist-Rick Hopkins, legal David Mosher and stakeholder representative-Tom Armstrong. We received a scope of work from Morrison & Foerster, LLP in order to gain a better understanding of the process and cost. Staff reviewed the County's report and submitted comments on April 11 (*see Attachment 5*), and attended two workshops on habitat conservation planning; one at UC Davis Extension and another on NCCP, sponsored by CDFG. Staff also researched other HCP/NCCP's in California and information available on the internet.

Overview of HCP/NCCP Major Process Steps

Staff developed a better understanding of the HCP/NCCP process and acknowledges that it is more complicated and costly than originally anticipated, when the City Council committed to undertake it last year. The preparation and adoption of an HCP/NCCP is a multi-year process with significant public participation. However, this preparation and adoption phase is akin to running only the first mile of a marathon, as implementation of the plan could continue for 50 years or more. The HCP/NCCP process is much like a general plan update, but more complicated due to the involvement of many public agencies, the very technical subject matter, strong public sentiments, and the conflicts inherent in balancing natural resource protection and

economic development. The HCP/NCCP is a regulatory document governing actions by the City.

There are specific federal regulatory requirements for the Habitat Conservation Plan contents and process. The NCCP is the state's version of the habitat conservation planning process, which has some different requirements, particularly for a participant's planning agreement and a public participation process. The steps outlined below blend the two processes into one process.

1. Pre-planning by City. This step is not required, but is recommended by staff so that the City determines its objectives and needs as the lead agency for the planning preparation process, prior to negotiating with the local agencies Memorandum of Understanding (MOU) and resource agencies (Planning Agreement). This should include contracting appropriate outside expertise and experience, at least legal counsel and a facilitator. The intent is to "begin with the end in mind".
2. Organize Local Agencies. This step is not required, but there is a need for a common level of understanding and agreement among the local partners regarding the project scope and objectives early in the process. This agreement could be recorded in the form of a Memorandum of Understanding or similar document. There are no required elements for such an agreement so the list would need to be developed. The County's report includes some recommended elements. This should be completed prior to the Planning Agreement.
3. Planning Agreement. This is required by the NCCP Act, and identifies the scope of the plan to be prepared and participating parties for common understanding with the state and federal agencies. The CDFG has specific items to be included in the planning agreement, which can establish a joint program with other state and federal agencies. The establishment of a public participation process is a planning agreement requirement.
4. Selection of Consultant Team. The use of consultants is not required, but certainly warranted given the highly technical nature of preparing habitat conservation plans. The consultant team would at least include a lead biologist, environmental [for preparation of NEPA Environmental Impact Statement (EIS) and CEQA Environmental Impact Report (EIR) documents], economist, facilitator, and possibly additional legal services. The administration of consultant contracts would need to be addressed in the local agency MOU.
5. Pre-plan preparation. This step is not a regulatory requirement but would include the tasks necessary to develop the work program before the process can begin in earnest. This effort would include development of a public participation program, early outreach efforts to identified stakeholders, public workshops and scoping meetings for education and involvement. A baseline inventory of biological and resource data would be developed, as well as collection needs. The range of conservation strategies would be developed with independent science advisors. The feasibility of conservation strategies should be tested through appropriate economic analysis. An early, informal scoping for CEQA/NEPA review should be done.

6. Prepare HCP/NCCP. The habitat conservation plan documents would be prepared in conformance with the legal requirements for HCPs and NCCPs set forth in the applicable statutes and regulations. There would be a myriad of meetings with decision-makers, local and resource agencies, and stakeholders, public and technical advisors.
7. Environmental Review. A combined EIR/EIS document would be prepared concurrently with the Habitat Conservation Plan to satisfy the requirements of CEQA and NEPA.
8. Adoption by Resource Agencies. The plans would be submitted to the resource agencies for adoption in accordance with respective legal requirements.
9. Implementation. The HCP/NCCP participants commit to the plan implementation by preparing and signing an Implementation Agreement. The local agency (i.e., City) is authorized to issue “proxy” take permits which can dramatically reduce the environmental review process timeline.

Immediate Next Steps – City Pre-planning and Memorandum of Understanding

The scope of the proposed HCP/NCCP was not explicitly defined in the initial commitments to USFWS and CDFG. The next step is for the City to prepare and negotiate an agreement, such as a Memorandum of Understanding (MOU) with the County and SCVWD, and other local partners that may wish to participate. The City should develop its independent position regarding the elements of the agreement, such as scope, institutional structure, roles and responsibilities, project management, funding, cost sharing, and timetable, prior to negotiating with the other local agencies. The County’s report includes recommendations that could be used as a starting point.

Staff recommends that a trained facilitator be used throughout the process to assist in reaching agreement among the local agencies for the HCP/NCCP. The scope, in terms of geographic area and species covered, should be defined first and sufficient to allow the City to meet its needs. The HCP/NCCP should be prepared and adopted in a timely manner, regardless of the scope. The institutional structure should be simply organized for efficiency and effectiveness. The organizational structure recommended in the County’s report is overly complex and unnecessary. The funding and cost sharing criteria between the local partners should be based on expected benefit.

As indicated in the City Administration’s comments to the County, the City views the preparation of the HCP/NCCP as a fundamental land use issue. The City intends to implement the adopted San Jose 2020 General Plan, which includes goals and policies for natural resource management, conservation, protection and sustainability. The geographic scope of the HCP/NCCP should be sufficient to allow the City to meet its infrastructure and development needs. The HCP/NCCP should facilitate urban development and construction of major capital facilities and improvements within the Greenline/Urban Growth Boundary. Furthermore, the Greenline should be made secure by the preservation and purchase of open space and the establishment of financial mechanisms to limit development to the identified urban areas.

The natural communities of concern (species) to be included should be adequate to provide the necessary regulatory coverage, but carefully selected for cost/benefit. Inclusion of the bayland

and wetland species should be seriously considered for the potential benefit to both the City's Department of Environmental Services projects and the Water Pollution Control Plant operations and obligations. The resource agencies have a strong desire for the City to participate in the HCP/NCCP because of the perceived potential growth inducing impacts of the reclaimed water program. The reclaimed water system also serves the Cities of Milpitas and Santa Clara. It is anticipated that any future federal funding for the WPCP or Water Recycling projects would trigger consultation with the USFWS. USFWS would require the preparation of the HCP and mitigation for direct and indirect impacts they may perceive the project might have on the different protected species and habitats.

Cost Implications

There is no existing budget for staff resources currently allocated for this project, and none proposed for FY2002-03 at this time. At some future time, when appropriate, the City may need to make a financial commitment to the development of the HCP. A better understanding of the costs is expected during the Pre-planning phase.

The City's June 25, 2001 letter indicated funding of approximately \$1,000,000 was pledged by the local public entities to support cooperative preparation of the HCP/NCCP/EIS/EIR. This was assumed to be jointly funded between the agencies and private parties involved. The City's intent was that Habitat Conservation Plan preparation costs would be borne by the developers in need of the plan (Coyote Valley Research Park, mid-Coyote, and others), as well as City departments with similar interests, such as Environmental Services.

The HCP/NCCP preparation and adoption is expected to cost substantially more than the \$1 million previously identified. Based on additional information and analysis, the HCP is more complicated and costly than staff previously believed. It is more likely between \$5 and closer to \$10 million (per San Diego's cost estimate). The County's consultant report identifies potential cost estimates, based upon some questionable assumptions, of almost \$16 million. This estimate seems high, particularly since it is based on an overly complicated organizational structure. A precise total estimate for HCP/NCCP preparation costs is difficult at this time since much depends on the nature and scope of the process to be pursued, the level of cooperation, and the amount of controversy. It is important to note that the planning costs are a small fraction of the long-term implementation costs for a large-scale habitat conservation program.

The City should identify and develop its interests and objectives, prior to entering MOU negotiations with the County and SCVWD. In order for the City's participation to be effective, it is essential to continue the preplanning work being done at this time. Staff is of the opinion that thoughtful attention to these preparatory phases is critical to protect the City's long-term interest, and to best accomplish the more visible HCP/NCCP preparation, review and adoption phases. Staff intends to collect additional information and attend meetings to better define the scope and understand the full cost implications.

Another cost implication is that preliminary HCP/NCCP work can be made more effective by contracting with an attorney, trained facilitator, and maybe a lead biologist, with expertise and experience in the preparation and adoption of habitat conservation plans. A team of experts could provide the City with valuable early assistance in the development of HCP/NCCP planning objectives and scope, proposed institutional structure, and the MOU, as well as negotiating with local partners, interfacing with resource agencies, selecting consultants, and other pre-planning efforts. A trained facilitator could greatly expedite the process by identifying issues and building consensus within group settings. A biologist could assess the existing scientific data and determine what else may be required. For cost example, legal services to get through the Planning Agreement process phase were estimated at \$200,000.

Funding Strategies

Ultimately, the development and implementation of HCP/NCCP should be shared equitably by federal, state, and local sources. Other sources could include private parties, non-profit interests, and grant monies. Local sources could come from new development and project mitigation fees, general local taxes and fees, and bond issues. The plan should provide for new development to pay for its impacts to threatened and endangered species, and for existing development to make a contribution to conservation. The County report outlines some cost sharing alternatives and identifies some funding assistance programs.

There is the potential for state and federal grant funding opportunities for regional, multi-species HCP/NCCP. These grants tend to be given to those processes with a high number of participating agencies and a large-scale conservation planning approach. The benefits of economies of scale (including more jurisdictions), however, must be weighed against the increased process complexity, inefficiency, and potential time delays. The County's report indicates that it is reasonable to assume that federal support of \$1,000,000 per year for the planning effort may be obtained.

PUBLIC OUTREACH

The HCP/NCCP was an item on the Development Industry Roundtable agenda on April 5, 2002. Private sector representatives present acknowledged the benefits, but indicated that the costs for plan preparation should be the City's financial responsibility with subsequent private development reimbursement. This staff report and related information will be posted on the PBCE web site. A public participation program is a NCCP regulatory requirement, and a vital component of the habitat conservation planning process.

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COORDINATION

The preparation of this memo was coordinated with the City Attorney's Office and the Department of Environmental Services.

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NOTES kept for consideration if appropriate, otherwise will be deleted

1. Direct the Administration to determine the work program required to complete the habitat conservation plan initial preplanning and local agency Memorandum of Understanding phase, and establish a budget for staff resources required to complete this first phase, as well as budget estimates for remaining phases needed prior to implementation.
2. Direct the Administration to more fully determine the development industry's level of financial commitment to the habitat conservation plan, particularly those private projects most directly affected.
3. Direct the Administration to more fully assess the habitat conservation plan benefits, costs and implications to City capital projects, particularly Reclaimed Water, Water Pollution Control Plant, NPDES and transportation.
4. Direct the Administration to continue discussions with other local agencies for the preparation of a MOU for a habitat conservation plan with a scope that will satisfy federal and state resource agencies and meet City's needs.
5. Direct the Administration to strive to keep the habitat conservation plan scope manageable for timely completion and adoption (3-4 years), and also to develop an implementation phasing plan.
6. Direct the Administration to determine the scope for consultant services related to preplanning and the MOU needed to develop and complete the first phase of the habitat conservation plan described above.

1. Direct the Administration to negotiate a Memorandum of Understanding with other local agencies regarding the preparation of a habitat conservation plan and associated Implementation Phase Plan, with San Jose designated as the lead agency.
2. Direct the Administration to prepare a multi-year budget plan to cover consultant and staff costs.

Alternatives/Options

The City should deliberately assess the benefits of the HCP/NCCP against the costs and time to participate in such an undertaking and allocate resources accordingly. The potential risks to private development and public projects of not proceeding at this time should be assessed. The current economic climate appears to make private sector financial participation, even "seed" money for preplanning start up costs, less likely at this time. The City's budget situation is no brighter and there is currently no existing budget for staff time for needed preplanning work.

The City has greater control over the benefits and effects of conservation biology in conjunction with land use planning by participating in the HCP/NCCP policy formulation and implementation. There is substantial risk and lost opportunity by having such policy created by others without the City's participation.

The intent of the Natural Resources goals and policies is to balance resource conservation and urban development, so as to maximize the achievement of environmental, economic, and social objectives. The General Plan Species of Concern Goal is to "preserve habitat suitable for Species of Concern, including threatened and endangered species".

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Items for City's immediate consideration:

- Determine our scope: geographic planning area and natural communities of concern (species), regulatory coverage (this is a biggy - CWA, baylands?)
- There should be additional internal City discussions with ESD to better ascertain the benefits and costs of the HCP/NCCP for the NPDES, WPCP, Reclaimed Water, and other public projects.
- Independent discussions with resource agencies for their expectations of City only.
- Contract consultant assistance, etc.
- Appropriate institutional structure if we are the lead agency
- Budget, cost sharing concepts
- Anticipate NEPA/CEQA
- Schedule/timing

what data do we have and what do we need?

Local Agencies would County and SCVWD, and maybe Morgan Hill and Gilroy, if WPCP = many other locals, if Reclaimed Water = Milpitas and Santa Clara, if NPDES = SCVWD & entire county.